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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 683

SCIENTIFIC LIVING, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

No opinion was rendered by the United States Court of Appeals for the Third Circuit.

JURISDICTION

The judgment of the court of appeals dismissing the appeal was entered on August 12, 1957 (Pet. 6). On September 3, 1957 the court denied a motion to vacate the judgment of dismissal (Pet. 10). The time for filing a petition for certiorari was extended by Mr. Justice Brennan on December 3, 1957, to December 12, 1957, and on the latter date to December 22, 1957 (Sunday).[1] The petition for certiorari

[1] On January 4, 1958, Mr. Justice Brennan denied an application for a stay.

was filed on December 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal for want of timely prosecution.

RULE INVOLVED

The pertinent portions of Rule 73 of the Federal Rules of Civil Procedure are as follows:

> Rule 73. *Appeal to a Court of Appeals.*
>
> (a) When and How Taken.
>
> * * * * *
>
> A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. * * *
>
> * * * * *

STATEMENT

On April 17, 1957, the District Court for the Middle District of Pennsylvania ordered compliance with a subpoena previously issued by the Federal Trade Commission which directed petitioner to produce designated books and documents. The subpoena was issued in the course of an investigation to determine whether petitioner, a corporation which sells and distributes in interstate commerce health foods and a cooking utensil, was complying with the Commission's 1953 order to cease and desist from making

certain misrepresentations as to the curative and health properties of its products.

On April 27, 1957, petitioner appealed from the order enforcing the subpoena to the Court of Appeals for the Third Circuit, and on May 29, 1957, it filed the record with that court (Pet. 2). Petitioner did not subsequently designate parts of the record for printing or file a brief and appendix as required by Rules 24 and 25 (Appendix, *infra*, p. 6) of the court, nor did it move for a continuance of the appeal. On August 12, 1957, the court of appeals dismissed the appeal "for want of timely prosecution" (Pet. 6).

On August 19, 1957, petitioner, through its secretary, moved to vacate the order of dismissal, alleging that petitioner's president, Hohensee, had begun service of a prison term (in an unrelated case) on June 24, 1957, and that Hohensee's imprisonment had made it impossible for petitioner to prosecute the appeal (Pet. 7–9). On September 3, 1957, the court of appeals denied this motion (Pet. 10). On October 7, 1957, the court denied a further motion (again filed by petitioner's secretary) to recall and stay the mandate pending the filing of a petition for certiorari.[2]

[2] After the mandate of the court of appeals had issued, the district court again directed compliance with the subpoena, and when petitioner refused to produce the documents held petitioner in contempt and fined it $3,000. Petitioner has appealed this order to the Court of Appeals for the Third Circuit, and its appeal has been docketed.

ARGUMENT

Rule 73 (a) of the Federal Rules of Civil Procedure provides that the failure of an appellant to take "further steps" to perfect an appeal after filing notice thereof is ground for "such action as the appellate court deems appropriate, which may include dismissal of the appeal" (Rule 73 (a)). This provision is "intended to place reliance upon the sound discretion" of the court of appeals in disposing of dilatory appeals. *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 704. In this case there is no basis for reversing the discretion exercised by the court of appeals in dismissing petitioner's appeal.

Petitioner plainly was in default of the Rules of the Court of Appeals for the Third Circuit in failing timely to prosecute its appeal. Although it filed the record in that court on May 29, 1957, it neither designated the parts of the record to be printed (which designation was due on June 8, 1957), nor filed its brief and appendix (which were due on June 28, 1957), as required, respectively, by Rules 24 (3) and 25 (1) (Appendix, *infra,* p. 6). The court entered its judgment dismissing the appeal on August 12, 1957, approximately six weeks after the brief and appendix were due, and petitioner made no attempt during the interval to obtain a continuance.

Petitioner contends (Pet. 3), however, that its default was justifiable because it was "without the advantage of counsel and without the service of its owner and president," Hohensee, who had been im-

prisoned in an unrelated case (Pet. 3). These facts do not, however, excuse petitioner's default. Despite Hohensee's imprisonment the corporation plainly was still able to prosecute the case, as shown by the fact that, after the appeal was dismissed, its secretary filed on its behalf motions to vacate the dismissal and to recall the mandate and has conducted other phases of the litigation. If petitioner desired to retain counsel, or if Hohensee's participation in the appeal had been necessary, the corporation, through its secretary, could have sought a continuance "for good cause," as provided by Rule 29 (5) (Appendix, *infra*, p. 7) of the Rules of the Court of Appeals for the Third Circuit.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1958.

At the time of Hohensee's imprisonment on June 24, 1957, petitioner was already 16 days in default with respect to furnishing a designation of record, and 26 of the 30 days for filing its brief had elapsed.

APPENDIX

Pertinent Rules of the Court of Appeals for the Third Circuit

Rule 24. *Form and Contents of Briefs and Appendices. Printing of Briefs.*

* * * * * *

(3) *Statement of Contents of Appendix to be Furnished Appellee or Respondent.* The appellant or petitioner shall furnish appellee or respondent with a statement of the parts of the record he proposes to include in the appendix pursuant to paragraph (2) (c) of this rule. The statement shall be furnished within 10 days after the filing of the record in the clerk's office unless a joint appendix is to be filed under paragraph (6) of this rule in which case it shall be furnished on or before the day on which the brief of the appellant or petitioner is served and filed.

* * * * *

Rule 25. *Filing of Briefs and Appendices.*

(1) *Time of Filing Briefs—Number of Copies—Service of Copies—Reply Briefs.* Within 30 days after the record is filed with the clerk of this court the appellant or petitioner shall file with the clerk 20 copies of a printed brief and serve five copies thereof on each opposing counsel. The appellee or respondent shall in like manner file and serve a brief within 30 days after the filing and serving of the appellant's or petitioner's brief. The appellant or petitioner may in like manner file and serve a reply brief within 15 days after the filing and serving of the appellee's or respondent's brief. No other briefs may be filed without special leave of court.

* * * * * *

Rule 29. *Argument List.*

* * * * *

(5) *Continuance.* For good cause shown the court may pass a case or order its continuance for the term. * * *

* * * * *

(7) *Dismissal Where Appellant or Petitioner Does Not Appear.* Where no counsel appears for the appellant or petitioner and no brief has been filed for him, the court may on motion of the appellee or respondent or on its own motion dismiss the appeal or petition at the cost of the defaulting party.

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